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BY

THE HONORABLE GRIFFIN B. BELL

ATTORNEY GENERAL OF THE UNITED STATES

ON

FOREIGN INTELLIGENCE AND THE LEGAL SYSTEM

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CENTRAL INTELLIGENCE AGENCY
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Let me begin by saying that the CIA is a great institution. No agency in the government has a higher calling -- to enable the President to conduct foreign policy and to provide the information necessary to preserve our country and keep it strong. The complexity and pace of the world in which we live require people of the highest competence and dedication to interpret international intentions and events.

I am proud that Admiral Turner, your able director, invited me to be the first Attorney General to speak at the CIA in its distinguished history, originating with the daring achievements of the OSS in World War II. I must note that it was a lawyer, William J. Donovan, who drafted the first plan for a central intelligence agency at President Roosevelt's request in 1944.

The relationship between the Agency and the Attorney General is in many ways a symbol of the challenge of this era of American history. For the CIA, the challenge is

to collect intelligence with one eye cocked to spot legal issues that might have gone unquestioned in the past. For the Attorney General, the challenge is to handle those legal issues in a scrupulous fashion while trying not to impair the effectiveness of the agency.

Stan Turner and I are on the same path. We have been striving to make our agencies as independent as possible from political influence. If the Justice Department is to do its job, it cannot flinch from prosecuting the powerful or rendering detached, sometimes unpleasant legal advice and letting the chips fall where they may. If CIA is to do its job, it must be willing and able to tell policymakers some unpleasant truths with unfailing accuracy, providing dispassionate analysis of foreign events and intentions for those involved in the passions of domestic politics who may want to see the world differently.

Fortunately, we have a president with the vision to understand that it is in the long-term interest of his Administration and those that will follow to encourage independence in institutions like ours. Indeed, he instructed me to make the Department of Justice a non-political institution. This has been done. I often compare our role with that of the foreign intelligence community. Our justice system, like our foreign

intelligence system, must be guided by neutral principles in a nonpartisan spirit.

It is fitting to observe today that a statue of Captain Nathan Hale stands in front of the Justice Department as well as the CIA. Nathan Hale epitomized the ideal of service to which we should aspire as Americans. Following the American defeat at the Battle of Brooklyn Heights on August 27, 1776, General Washington became desperate for information about British plans and strength. Nathan Hale was the only officer to volunteer for the hazardous mission of gathering intelligence behind British lines. Stepping forward to volunteer for the mission which was to cost his life, Hale said: "I wish to be useful, and every kind of service necessary to the public good becomes honorable by being necessary." This ideal of service is a standard to which all of us in government should aspire.

Some of the most difficult and important problems I have encountered in government have been in the intelligence field. The DCI is not the only one whose life is complicated by wearing two hats. The Attorney General is both the legal adviser to the government and the administrator of a large department containing one of the government's premier intelligence agencies -- the Federal Bureau of Investigation. Often in making

decisions in a counterespionage case, I am pulled between the traditional law enforcement approach to Justice and the pure discipline of information monitoring and foreign intelligence analysis. As you know, I lean to the view that incarceration is a deterrent to spying. At the least, an attitude of prosecution might lead to a "spy detente."

The President has delegated certain duties to me in the counterintelligence area. I make daily decisions about authorizing the use of intelligence techniques that intrude into a sphere of privacy -- electronic surveillance of various forms, mail covers, and physical search. I have tried to exercise this authority with great restraint and care, especially when the rights of American citizens are at issue. I have also tried to stand up to the responsibility to use this authority vigorously whenever it has appeared that it would properly strengthen our nation's efforts to thwart or impede clandestine intelligence activity for a foreign power.

The Attorney General must also be a legal adviser and a litigator -- for the President and for other agencies in the government. When the CIA needs to bring a lawsuit or needs defense from a suit, that task falls to the Justice Department. The Snepp case is an example. It involved a dispute over fundamental principles. We have prevailed thus far. As a follow-up, I have recently directed a comprehensive review of the government's

security agreements. We need to design agreements that are narrowly tailored, easily understood and easily enforced.

Finally, the Attorney General provides general legal advice and assistance by participating in the drafting of legislation and regulations, and by interpreting many community-wide regulations of intelligence activity.

The guidelines and charter writing business is as delicate as open heart surgery. Our country cannot afford to allow regulators in any branch of government to become so entranced with the artistry of operating on an agency that they forget the goal -- to maintain a healthy and effective agency that has the confidence of the American people.

I have recently decided to create a new Office of Intelligence Policy and Review at the Justice Department to consolidate a number of intelligence-related functions. This office will provide the intelligence community with a resource for more timely and consistent legal advice and legislative assistance. The office will review compliance with Attorney General regulations and provide clear interpretation of those regulations. With this structure, we will be able to provide better legal assistance in the intelligence area without blurring the distinction between lawyers and intelligence operatives.

In a sense, this is the era of the "founding fathers" in the field of intelligence law. After all that we have been through in the recent past, there is a recognition on all sides that intelligence activity must be administered within the constitutional framework and that a legal system of accountability is needed.

We must strive to assure the people that their intelligence agencies will not be turned against them. Such fear is illustrated by the words of Sir Thomas Erskine May in 1873 in his Constitutional History of England:

> "Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators, -- who shall say that they are free? Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gaiety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency."

Our job as lawyers is to design a system of law in the intelligence field that reassures the American citizen and still works with you, not against you.

As Attorney General, I am here to discuss the intersection of our interests in certain legal areas. I would also like to wave the flag a bit. I think the American people are still distinguished by the heritage of the banners of the American Revolution. For example,

Lieutenant John Marshall, later to become Chief Justice of the United States, served as drillmaster for the Culpeper Minute Men, a celebrated Virginia battalion with the famous flag which bore a coiled rattlesnake with the motto: "Don't Tread on Me -- Liberty or Death." America must continue to carry that spirit into the international arena if we are to survive and prosper. This prevalent spirit assures me that the American people want a strong intelligence system and a strong CIA.

Our path for strengthening the CIA lies in making certain that all its activities are channeled in law. In that sense, the law is our support. Current law, however, presents problems in some areas. One example is the so-called "graymail" phenomenon.

"Graymail" has become shorthand for the ability of a defense lawyer to use current legal procedures to gain leverage by seeking a court ruling compelling government disclosure of national security information. The government is then forced into the position of sustaining the damage of the disclosure or conceding a critical point or dropping the case altogether.

In cases involving classified information, there is an inevitable tension between the responsibility of the Director of Central Intelligence to prevent the compromise of intelligence sources and methods and the responsibility

of the Attorney General for vigorous enforcement of the criminal laws. That tension is exacerbated by "graymail" problems. It is ironic and unfortunate that espionage prosecutions brought to maintain necessary secrecy often pose risks of disclosing our secrets under the current system.

As Attorney General, I have vigorously enforced the espionage laws. You know the cases. I believe that such serious transgressions against this nation cannot go unpunished. I am convinced that such prosecutions are necessary to maintain a credible deterrent to future acts that would jeopardize national security. At the same time, I am sensitive to the need to minimize the security costs associated with such prosecutions. I have directed Justice lawyers to conduct meticulously our cases to guard against disclosure of sensitive materials and to work closely with the intelligence community to evaluate the costs of disclosures which appear to be necessary to bringing a case.

Although the same procedural problems exist in non-espionage prosecutions, the most serious consequences for the CIA and Justice occur when criminal law enforcement efforts yield to security concerns. Inevitably, there are claims that a prosecution was dropped at the urging of the intelligence community to avoid embarrassing

revelations of misconduct. Even more importantly, there is the danger that those associated with intelligence activities are treated or perceived as above the law. A system that fosters such perceptions undermines the public's confidence in intelligence activities and in the fair administration of justice.

My experience as Attorney General has convinced me that we may be able to solve most of the problem through prudent changes in existing law. I am joined in this view by others in the Executive branch, including the Director of Central Intelligence. Senator Joseph Biden's Subcommittee of the Senate Select Committee on Intelligence and Congressman Morgan Murphy's Subcommittee of House Intelligence have held hearings examining the "graymail" question. They are working with us to develop legislative solutions to the "graymail" problem.

Draft legislation has now been formulated at Justice in close consultation with the intelligence community and these Congressional subcommittees. Our legislative proposal would enhance the government's ability to discharge its prosecutorial and intelligence responsibilities without undermining a defendant's right to fair trial. It would produce a more systematic and predictable manner of handling cases involving classified information.

First, the proposal would create a procedure for pretrial rulings on whether classified information must be disclosed either at pretrial or trial proceedings. This will enable the government to receive a preliminary decision on whether national security information must be produced to a defendant and whether it may be used by a defendant in the trial. It would also prevent the premature and unnecessary abandonment of prosecutions in the face of "graymail" threats by allowing the government to obtain court orders barring the disclosure of inadmissible classified information. Where classified information is determined by the court to be admissible in evidence at the behest of a defendant, there would be a chance to seek alternatives to disclosure of particular information while preserving the prosecution. In sum, this procedure would equip the government to make an informed assessment, prior to trial, of the national security costs of continuing a prosecution.

Second, our proposal would authorize the government to take interlocutory appeals from adverse district court orders requiring disclosure of classified information. There is no effective provision for such appeals in the current law.

In addition to these two key provisions, the proposal includes an array of other procedural safeguards.

- It establishes a procedural mechanism for setting early timetables to resolve issues in criminal cases involving classified information.
- It requires protective orders to safeguard classified materials that may be ordered disclosed to defendants although not revealed in open court.
- It provides guidance on alternatives to disclosure of specific classified information to the defendant and provides other proof procedures at trial to avoid unnecessary disclosure.
- It establishes security procedures for safekeeping of classified information submitted to the courts.

I believe that such legislation will go a long way toward solving the "graymail" problem. I urge the appropriate committees of Congress to give expedited consideration to our proposals.

Another major area where there is a need for good lawyering in the intelligence field is in the development of charter legislation. I have worked for over two years on constructing a legal framework for the intelligence agencies and for systems ensuring accountability, control, and oversight for intelligence activities. This has involved drafting Executive Orders, Attorney General guidelines and now charters.

This experience teaches two truths. First, if charters will prevent intelligence agencies from performing their mission effectively, they are not worth the price. Second, if well-balanced charter legislation can be enacted, it would be a truly valuable and historic achievement. As James Madison put it in the Federalist Papers: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

If the charter process fails, our intelligence activities will continue and our regulatory system will remain intact, but there will be a loss. Without charters, the climate of suspicion will continue -- breeding unfounded conspiracy theories and Congressional interference in operational management decisions. Second, this atmosphere will be compounded by continued uncertainty about the law, tending to chill and deter decisionmaking and action by field operatives as well as those at headquarters who must decide what information to disseminate or what operations to authorize.

Neither the officer tracking espionage abroad nor the Attorney General who is faced with wiretap requests should have to worry about a different Congress or a different

administration retrospectively judging good faith decisions. Clear laws and judicial warrants should provide intelligence officers with relief from the threat of lawsuits which now hangs over their heads. By statutorily involving the judiciary, as they are already involved in criminal cases, in authorizing intrusive investigative techniques against Americans, a charter can provide greater certainty in the law.

At the same time, a sound charter would provide a mandate for proper intelligence collection. I want to emphasize that none of the benefits from such legislation could ever compensate for the damage that could be done by unnecessary restrictions that would be against the national interest. It would be better to do without charters than suffer such restrictions. I believe, however, that reason and good sense will prevail. The passage of the Foreign Intelligence Surveillance Act demonstrated that a proper balance can be struck between national security and civil liberties. I expect that Congress will act responsibly in the charter process as well.

One of my great surprises when I became Attorney General was to discover how much of my time was consumed with intelligence work -- from case-by-case decisions to framing sweeping intelligence policy. I now realize how enriching and important this work has been for me.

It presents many basic questions for our constitutional system. In my tenure, I have seen the men and women of the CIA perform with excellence in situations requiring great judgment as well as ability. You have a hard job to do in hard times. It has never been more important that you do it right. The Department of Justice is pledged to assist you.

You are our first line of patriots in war and peace. Our nation depends on you, for there can be no adequate foreign policy without an ample intelligence system. You are ennobled by the fact that you must perform without the reward of public recognition, often in the face of high risk. The President has asked that I thank you today on behalf of the American people for what you have done and for what you are doing.